STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

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greater customers as competitive service	:	
pursuant to Section 16-113 of the Public	:	
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tariff amendments.	:	

GOVERNMENTAL AND CONSUMER PARTIES' INITIAL BRIEF

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Pursuant to Section 200.800 of the Rules of Practice of the Illinois Commerce Commission (the Commission) and the schedule established by the Administrative Law Judges (ALJs), the City of Chicago (the City), by Mara S. Georges, Corporation Counsel of the City of Chicago, the Cook County State's Attorney's Office, *ex rel.* Richard A. Devine, the Citizens Utility Board (collectively, Governmental and Consumer Parties), submit their Initial Brief in this case. This brief is organized in accordance with the outline of issues approved by the ALJs at the status hearing conducted on September 15, 2002.

INTRODUCTION AND SUMMARY OF ARGUMENT

INTRODUCTION

This case concerns a Petition for Competitive Service Declaration ("Petition") filed by Commonwealth Edison Company (Edison or ComEd) asking that Rate 6L service to customers with demands equal to or greater than 3 megawatts ($\geq$ 3MW) be declared competitive pursuant to Section 16-113 of the Public Utilities Act (the Act). According to Edison, there are 373 Rate 6L

eligible customers that would be affected by the requested declaration, and they represent approximately 2,500 MW of demand. Edison Ex. 8 at 7, L. 6 (Crumrine Dir.).[1]

To obtain a declaration that Rate 6L service is competitive, pursuant to Section 16-113(a), Edison must establish that (1) for a properly defined group of customers (2) a "reasonably equivalent substitute service" (3) is "reasonably available" (4) at a "comparable price" (5) from suppliers other than Edison or affiliates of Edison and (6) that Edison has lost or is reasonably likely to lose business (7) to non-affiliated suppliers. 220 ILCS 5/16-113(a). In determining whether Edison has satisfied these criteria, the Commission must also consider whether there is sufficient transmission capacity into ComEd's service territory "to make electric power and energy available" to the affected customers. *Id*.

SUMMARY OF ARGUMENT

The statutory requirements for a competitive declaration are plainly defined in Section 16-113 of the Act.[2] To obtain the relief it has requested, Edison must prove that each element of the Act's competitiveness test is satisfied for the Rate 6L ≥3MW customer group it has selected. However, the testimony of Edison's own witnesses undermines the utility's specific allegations as to each of the Section 16-113 criteria.[3]

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[1] For brevity, panel testimony is cited using the name of the first panel member only.

[2] Illinois Public Utilities Act, 220 ILCS 5/-101 *et seq*. ("the Act" or "PUA").

[3] As argued elsewhere in this brief, Governmental and Consumer Parties submit that the Commission should reverse the unexplained ruling of the ALJs denying the Joint Motion to Dismiss, or in the Alternative, for Summary Judgment ("Joint Motion to Dismiss"). The specific relief Edison seeks in its Petition remains a matter of some uncertainty. In addition to the ambiguity in the language of the Petition, Edison's witnesses have exacerbated the original lack

Whether one reads Edison's Petition as seeking a competitive declaration for all or for only parts of Rate 6L, Edison's allegations and supporting evidence fall short of statutory standards. As the Joint Motion to Dismiss argued, the utility's allegations are deficient. The record – now fully developed – shows that even those allegations are unsupported.

It is fair to say that all parties except Edison reject the notion that the record as a whole warrants a finding that Rate 6L is a competitive service. NewEnergy, the only party supporting Edison, does so only equivocally. NewEnergy opposes a declaration if it diminishes the Commission's ability to reverse its decision if Edison fails again to remove impediments to an open market. Tr. 338 (O'Connor).

Beyond testimony from its own witnesses that contradicts the Petition's allegations, there is a more pervasive infirmity in Edison's case. The apparent logic of Edison's evidentiary presentation rests upon four fundamental factual and legal premises. Edison has failed to establish the validity of even a single one of these premises, revealing as hollow the utility's "switching"-based case for the competitiveness of Rate 6L service.

In the following sections of this brief, we examine the law and the record, with respect to the flawed premises of Edison's evidentiary case, and with respect to the individual criteria defined in Section 16-113.

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of clarity with inconsistent statements about the nature of the service(s) it seeks to have declared competitive. *See* discussion, *infra*.

ARGUMENT

OVERVIEW

The statutory requirements for a competitive declaration are plainly defined in Section 16-113 of the Act. To obtain the relief it has requested, Edison must prove that each element of the Act's competitiveness test is satisfied for Rate 6L service and the ≥3MW Rate 6L customer group it has selected. However, the testimony of Edison's own witnesses undermines the utility's specific allegations as to each of the Section 16-113 criteria. The testimony often reflects Edison's self-interested (instead of customer benefit) view of competition or its erroneous view that a professed expectation of comparable service and price suffices for purposes of Section 16-113.

What Section 16-113 Requires	What Edison's Witnesses Say
❑ *"reasonably equivalent substitute service"*	❑ "[L]ong term Rate 6L like contracts" described as "including all the risks associated with potential transmission increase, distribution increase, CTC changes, all in." Tr. 535 (Crumrine). ❑ "All I know is that these were on their web site . . . ." (re if products are actually being offered) "The terms and conditions other than the general nature of the offering is not indicated in the web site. So I have no specific knowledge of the prices." Tr. 1038-1040 (Landon).
❑ *"reasonably available"*	❑ "I agree" [that a mature stable commodity market with risk management tools does not yet exist] Tr. 858 (Juracek). ❑ "[O]ne can foresee RESs offering . . . long term Rate 6L like contracts . . . next year. Edison Ex. 8 at 15, L. 296 (Crumrine Reb.).
❑ *"comparable price"*	❑ "[Rate 6L] is quite different from market rates that are offered by RESs [selectively]. . . . It's a different kettle of fish." Tr. 1120-1121 (Landon). ❑ "The terms and conditions other than the general nature of the offering is not indicated in the web site. So I have no specific knowledge of the prices." Tr. 1040 (Landon). ❑ "If a customer says "I want these 10 features . . . and I want them at the regular price, you may have trouble getting somebody [to] come out and do business with you." Tr. 1087 (Landon) (emphasis added).
❑ *"identifiable customer segment or group" [for which criteria are met]*	❑ "As for customers that have not switched, they are most likely an indication that . . . the importance of electric rates has not impelled them to shop . . . . [T]hese issues . . . make it important to nudge the birds out of the nest . . . ." CE Ex. 14 at 6, L. 111 (Landon Reb.). ❑ "[O]ne should not equate the inability of numerous suppliers to completely comply with the wishes of a few unique customers as a failure of the market place." CE Ex. 8 at 16, L. 319 (Crumrine Reb.). ❑ "[≥3MW customers] are a diverse group with varying electricity needs." CE Ex. 8 at 9, L. 171 (Crumrine Reb.).
❑ *"lose business for the service"*	❑ "[T]he specifics of the [CTC] mechanism [which protects Edison's monopoly era revenues] is something that I've not studied." Tr. 1035 (Landon); Sec. 16-102.
❑ *"adequate transmission capacity"*	❑ "There was no adjustment in any of the analyses for new requirements on any party in the market" – despite pending new, additional FERC and PJM generation and transmission resource requirements. Tr. 451, 448-451 (McNeil).

As noted originally in the Joint Motion to Dismiss, whether one reads the Petition as seeking a competitive declaration for all or for only parts of Rate 6L, Edison's allegations and supporting evidence fall short of the statutory mark. As the Joint Motion to Dismiss

demonstrated, the allegations themselves are deficient in failing either (a) to allege the competitiveness of all of Rate 6L service or (b) to address the provision or abandonment of those components of the bundled service not declared competitive. The record – now fully developed – shows that even those allegations are unsupported.

All parties except Edison reject the notion that the record as a whole warrants a finding that Rate 6L is a competitive service. NewEnergy, a prospective beneficiary of Edison's drive to force ≥ 3MW Rate 6L customers off Rate 6L, is the only party supporting a competitive declaration – but only by operation of law (*i.e.*, without a Commission finding of competitiveness). NewEnergy believes that giving Edison the declaration it seeks would be an incentive for the utility to live up to its statutory obligation to open its markets.[4] Tr. 360 (O'Connor). But, NewEnergy opposes a finding of competitiveness if that could inhibit the Commission's ability to reverse the effectiveness of a declaration. Tr. 338 (O'Connor). NewEnergy seems only cautiously hopeful that Edison will remove the principal barriers to competition – flawed market value energy charges (MVECs) and customer transition charges (CTCs) that Edison alone controls. Tr. 329, 344, 336 (O'Connor).

Ultimately, NewEnergy concludes that approval of Edison's Petition would be a "close call" even when using a narrow "flowed power" criterion that does not satisfy Section 16-113 standards. Tr. 386 (O'Connor). When the Commission considers all the evidence (including the distortions of switching and "flowed power" data due to statutory discounts and artificial

[4] NewEnergy posits that Edison will allow the market to develop only on its own terms. Therefore, it argues, to get market conditions that meet the Section 16-113 criteria, the Commission should first give Edison all that it asks – ignoring the current absence of the necessary conditions.

inducements from Edison and Exelon), and applies the statutory criteria, the call should not be close at all.

Beyond testimony from its own witnesses contradicting the Petition, there is a more pervasive infirmity in Edison's case. The apparent logic of Edison's evidentiary presentation rests upon four fundamental factual and legal premises. Edison has failed to establish the validity of even a single one of these premises, revealing the hollowness of utility's entire attempt to demonstrate that Rate 6L service is "competitive."

The four premises on which Edison's case rests are these.

One: Evidence of customer switching is tantamount to proof of the Section 16-113 equivalence, availability and price criteria – but customer decisions not to switch prove nothing. *See, e.g.*, Tr. 570-571, 623 (Crumrine).

Two: Rate 6L service means only the provision of power and energy to ≥3MW customers. The Commission can properly ignore (or view positively) any absence of availability or price comparability for alternatives to other components of Rate 6L service – even if they are valued by customers. *See, e.g.*, Edison Ex. 9 at 11-12, L. 222, 244 (Juracek Dir.); Edison Ex. 7 at 19, L. 360 (Crumrine Dir.); Edison Response to Motion to Dismiss at 4, ¶7; Tr. 668, 662 (equivalence of other services), 570-571, 623 (switching equals equivalence) (Crumrine).

Three: In the name of developing competition, the Commission can deliberately interpret and apply Section 16-113 to worsen the availability, quality and prices of tariffed services, so that fewer choices, higher prices and worse service will force customers to "choose." In other words, "Let's get prices up, quality down, and services withdrawn so we can have 'competition'." *See,*

e.g., Edison Ex. 9 at 8, 12, L. 137-42, 238-41 (Juracek Dir.); Edison Ex. 10 at 9, L. 161 (Juracek Reb.); Edison Ex. 7 at 19, L. 360 (Crumrine Dir.); Tr. 818 (Juracek).

Four: Section 16-113 should not be interpreted to require that effectively competitive options for the customers in the identified group exist now – rather, under economic theory or market predictions, they might be expected to develop in the future. *See*, Edison Ex. 9 at 14, L. 282 (Juracek Dir.); Edison Ex. 5 at 9-10, L. 152-63 (McNeil Dir.) (generation ownership analysis focusing solely on historical and 2004 data); Edison Ex. 7 at 19, L. 360 (Crumrine Dir.).

The record shows that each of these premises is unsupported by the greater weight of evidence or law.

The first premise – that switching statistics alone can show that the Section 16-113 criteria are met – is belied by the admissions on cross-examination of Edison's economists and managers, as well as the testimony of other experts. Edison's witnesses admit:

- ❑ that their switching data do not reveal the reasons for customer switches (Tr. 678, 680 (Crumrine));

- ❑ that their data were affected by the market interventions of Edison and Exelon Generation (Tr. 521, 640, 681 (Crumrine)); economic inducements to switch (Tr. 436 (McNeil), 681 (Crumrine)); and factors other than the services and prices in the market;

- ❑ that there is no assurance that these artificial market supports (PPO contract waivers and wholesale supply discounts) or switching inducements (*e.g.*, mitigation factor) will continue (Tr. 439-440 (McNeil)), and their data do not reflect market forces in the absence of current extra-market influences (Tr. 681-683 (Crumrine)); and

- ❑ that switching statistics alone do not reveal all the information or circumstances that are relevant to the Commission's decision (Edison Ex. 3 at 9, L. 196; Tr. 176 (McDermott); Tr. 627 (Crumrine)).

The admissions of Edison's witnesses when cross-examined negate the conclusory assertions presented in its filed exhibits. And, all other (non-Edison) expert witnesses addressing this premise reject it outright. *See, e.g.*, Staff Ex. 3.0 at 11, L. 244, Tr. 730, 739 (Haas); IIEC Ex. 2.0 at 4-6 (Chalfant); CACC Ex. 1.0 at 8, L. 232 (Fults); DOE Ex. 1.0 at 12-12, L. 259-86 (Swan); MidAmerican Ex. 1.0 at 3-4, L. 55-76 (Schillinger). Thus, the fundamental empirical premise of Edison's case is unsupported by a preponderance of the evidence.

Edison's second premise arose from its response to the Joint Motion to Dismiss its ambiguous Petition. Edison postulated that reasonably equivalent substitutes for Rate 6L service need only deliver power and energy to customers (no matter the service terms or duration), since Rate 6L is nothing more than power and energy. Therefore, Edison suggests, any additional services provided as part of the Rate 6L tariff can be ignored.

Customers, the market, and sound economic theory take a different view – as should the Commission. Indeed, even Edison's experts were unable to maintain consistently the fiction that Rate 6L is only power and energy. *Compare, e.g.*, Tr. 134, 158-160, 162-163 (McDermott) and Tr. 1122 (Landon). Edison's Rate 6L customers find other services bundled in the Rate 6L tariff (like effective price and CTC hedging) not only valuable, but difficult or impossible to replace in today's market. *See, e.g.*, CACC Ex. 1 at 11, L. 304-21 (Fults); DOE Ex. 1 at 11, L. 226-28 (Swan); IIEC Ex. 4.0 at 9 (Stephens). Without reasonably equivalent substitute services at comparable prices, either in the market (or in tariffs that continue services not properly abandoned), the relief requested by Edison's Petition is unlawful. 220 ILCS 5/8-508, 16-113.

Edison's legal/policy premises also are flawed. They are inconsistent with both the purposes of the Act and the language of the governing provisions. Edison has abandoned the

Act's objective of lower prices and more choices through competition, in favor of their opposites. Edison's proposal is more reflective of a new mantra: "Let's get prices up so we can have competition."

The Commission should reject out of hand Edison's third premise, that the limited authority granted by the Act can be contorted to try to create – rather than to find – the existence of the competition Section 16-113 requires for a declaration. Not only is it unlawful, it is impractical. As Edison's regulatory economist Dr. Landon observed, legislative and regulatory mandates "cannot create it [competition]." Edison Ex. 13 at 11, L. 236-37. Nonetheless, Edison has devised a scheme (its POLR initiative, which incorporates this petition) to create "meaningful value proposition[s]" for RESs. CE Ex. 6 at 5, L. 455 (McNeil Dir.). In other words, as the McNeil/Kelter panel acknowledged, Edison plans systematically to reduce the attractiveness of its services, raise the price volatiliy customers face, and reduce customers' service choices to "create competition" where it does not now exist. Tr. 452-55 (McNeil).

Edison's final premise is an unlawfully loose reading of the plain language of the Section 16-113 criteria for a competitive declaration. The evidence raises serious questions about Edison's fidelity to Section 16-113's requirement of a properly identified group, for which the competition standards are met.

Approximately 30% of the group selected by Edison has <u>not</u> moved from bundled service. Staff Ex. 3.0 at 7, L. 156-65 (Haas). Though it entirely bases its case on "switching" data, Edison argues that "not switching" is an essentially meaningless indicator (Tr. 683 (Crumrine)) – blaming customers as unmotivated (Edison Ex. 14 at 6, L. 111-13 (Landon Reb.)) or too timid (Edison Ex. 10 at 6, L. 112 (Juracek Reb.)). At the same time, Edison argues inconsistently that

≥3MW customers are capable shoppers and are unlikely to make uneconomic decisions (Tr. 897 (Juracek)). This suggests strongly that a sizable subset of the defined ≥3MW Rate 6L customer group may, in fact, lack the requisite competitive alternatives (Tr. 739 (Haas)).

In the face of undeniable facts about the current state of alternative services, Edison must obscure its strained construction of the word "is"in Section 16-113 ("declare the service to be a competitive service . . . if the service or a reasonably equivalent substitute service **is** . . . .") Much of the evidence upon which Edison relies is meaningful only under Edison's reading of the Act – that "is" means "might be, in the future". For example, Mr. Crumrine "foresees" Rate 6L like products, in the future (Edison Ex. 8 at 15, L. 296 (Crumrine Reb.)); Ms. Juracek opines that RESs will be in a better position to offer hedged long-term products (like Rate 6L) in the future, if the Commission declares Rate 6L competitive, despite the current void of such services. Edison Ex. 9 at 11, L. 207-09 (Juracek Dir.). This strained reading of Section 16-113, however, is rejected even by its own regulatory expert, Dr. McDermott. Tr. 205.

Under any reading of Edison's ambiguous Petition, the clear requirements of the Act have not been satisfied, and the Petition must be denied. The evidence of record with respect to each of the statutory criteria is reviewed below in the format defined by the outline approved by the ALJs. In accordance with that outline, certain legal issues are treated first.

I. OVERVIEW OF STATUTORY STANDARDS AND OBJECTIVES

At least three sections of the Act are relevant to the Commission's inquiry – Sections 16-113, 8-508, and 16-101A. Section 16-113 sets forth the criteria the Commission must apply to determine whether it should grant Edison's petition to declare Rate 6L competitive. Section

8-508 requires that utilities receive Commission approval before abandoning any service. Section 16-101A describes the General Assembly's legislative findings in enacting the Electric Service Customer Choice and Rate Relief Law of 1997 (the 1997 Amendments).

A. Section 16-113

The primary statute governing this proceeding is Section 16-113(a) of the Act. The Commission's determination in this proceeding will be its first application of the competitive declaration concept to electric utilities and its first substantive application of Section 16-113 of the Act. To prevail under Section 16-113(a), Edison must prove that:

- ❒ The affected "group of customers" has "reasonably available" to them a "substitute service" that is "reasonably equivalent" to Rate 6L.
- ❒ That the "reasonably equivalent substitute service" is available at a "comparable price."
- ❒ That the "reasonably equivalent substitute service" is available from one or more providers not affiliated with Edison.
- ❒ That the utility has lost business or is likely to lose business to the non-affiliated provider(s).

220 ILCS 5/16-113(a). Section 16-113(a) further provides that, in weighing the evidence against these criteria, the Commission must consider the amount of transmission capacity available in Edison's service territory. *Id.*

The criteria found in Section 16-113(a) are straightforward, and the Commission's application of those criteria should be equally direct. The Act requires that "reasonably equivalent substitute service ***is*** reasonably available to the [affected customers] at a comparable price from one or more [non-affiliated providers]." 220 ILCS 5/16-113(a) (emphasis supplied).

That is, as Edison witness and former Commissioner Dr. McDermott testified, the Act requires a demonstration that the market currently meets the statutory competitive criteria. Tr. 204-05 (McDermott). The Commission cannot lawfully approve Edison's petition on a hope or a prediction that declaring Rate 6L service competitive for customers with demands of at least 3MW will induce the future development of "substitute services" "reasonably equivalent" to Rate 6L.

Even on this most basic point, Edison's testimony is contradictory, or at the least ambiguous. On one hand, the utility asserts that "reasonably equivalent substitute service" is available and that service to the affected customer group ***is*** "highly competitive." Edison Ex. 9 at 7, L. 134-35 (Juracek Dir.) Simultaneously, Edison asserts that Rate 6L is retarding the development of the market – in particular, of risk management tools like those that are a valued component of Rate 6L. *See*, *e.g.*, Edison Ex. 9 at 11, L. 207-09 (Juracek Dir.); Edison Ex. 13 at 19, L. 396-98 (Landon Dir.).

The fixed price hedge that Edison argues is precluded by Rate 6L's existence is prized by ≥ 3MW customers for the protection it provides against market price and CTC volatility and the unknowns of future delivery prices and requirements. *See*, *e.g.*, IIEC Ex. 4.0 at 12 (Stephens). Edison concedes that this attribute of the Rate 6L tariff service ***is not*** currently available in the market, and argues that only granting its petition will impel the development of "reasonably equivalent substitute" hedging products. Edison Ex. 9 at 11, L. 206-09 (Juracek Dir.).[5]

[5] Edison's willingness to eliminate customers' safety net and force them into the market, whether that market is sufficiently developed or not, is especially ironic, given the utility's uncompromising insistence on preserving its own safety net – the recovery of CTC charges that preserve its regulated service era revenues. *See*, *e.g.*, Edison Ex. 4, at 5, L. 129-31 (McDermott Reb.).

Reversing the clear time requirements of Section 16-113, Edison concludes that "the Commission may need to take steps to 'push the birds out of the nest.'" Edison Ex. 13 at 12, L. 255 (Landon Dir.). Edison's inconsistent duality on this point can be resolved through a clear application by the Commission of the plain requirements of the Act.

B. Other Sections of the Act

Sections 8-508 and 16-101A of the Act also are relevant to the Commission's decision. Section 8-508 is implicated because, as explained in the Joint Motion to Dismiss, Edison's petition is fatally deficient; it fails to identify with requisite specificity the relief the utility seeks. One interpretation of Edison's petition and testimony is that the utility desires that all of Rate 6L service to the affected customers be declared competitive. In its response to the Joint Motion to Dismiss, Edison argued that this is the obvious purpose of its petition. Edison Response to Motion to Dismiss at 3-4.

A second interpretation of Edison's petition is that the utility is asking that only the electric power and energy component of Rate 6L be declared competitive.[6] If that is the case, as the scope of Edison's evidentiary presentation arguably implies, then it was incumbent on Edison to present testimony defining the prices and terms on which it would continue to provide the remaining tariffed components of Rate 6L – services such as facilities, metering and billing services, and protection provided by the tariff against market commodity prices, CTC re-calculations, and changes in transmission and delivery prices or requirements. Alternatively,

[6] Illinois Power Company (IP) interpreted Edison's Petition in this fashion and argued in its response to the Joint Motion to Dismiss that this second interpretation is the true intent of the Petition. IP Response to the Joint Motion to Dismiss at 2.

Edison must request Commission approval under Section 8-508 to abandon providing the remaining components of Rate 6L. 220 ILCS 5/8-508.

In a ruling dated September 9, 2002, the ALJs denied, without comment or explanation, the Joint Motion to Dismiss. If the Commission concludes – as the evidence suggests it could – that ComEd is seeking only to have the electric power and energy component of Rate 6L declared competitive, then ComEd's petition must be denied because the utility has not provided pricing and service terms for the other components of Rate 6L it must continue to provide. Nor has ComEd asked – in the alternative – for Commission authority under Section 8-508 to abandon providing the remaining components of Rate 6L.

The purpose and history of the Commission's competitive declarations are important as the Commission interprets and applies Section 16-113 to an electric utility for the first time. As Mr. Bodmer explains, such declarations protect a utility against a loss of revenues due to loss of business to alternative providers. BOMA/CACC Ex. 1.0 at 28, L. 746 (Bodmer). A utility's regulated rates are set at a level that give it an opportunity to earn revenues that provide a just and reasonable return.

Where an inability to "react to market forces" results in (or is likely to result in) a loss of business, a competitive declaration is authorized as a remedial measure (assuming other criteria are satisfied). The service is declared "competitive" and no longer subject to traditional regulation. In effect, a meaningful opportunity to earn its authorized revenues has been restored to the utility. In telecommunications, where such declarations have been used most frequently, declarations are deemed to grant the utility flexibility to react to market forces – to provide the service without the usual regulatory delays and constraints. We are unaware of any case in which

a declaration that a service is competitive authorized abandonment of a service instead of competitive marketing of the service.

Edison's Petition, however, announces its apparent intention to use the declaration to withdraw Rate 6L service – not to offer it on a competitive basis. Indeed, Edison's Petition makes a strong case that the utility does not intend to respond to market forces at all, but to defy them. Edison wishes to withdraw Rate 6L service because, it argues, there is too much market demand for it. Edison's proposal unlawfully evades the requirements of Section 8-508, and it perverts the purpose of the competitive declaration.

Section 16-101A articulates legislative findings made by the General Assembly when it enacted the 1997 Amendments to the Act. Among those findings is an expectation that wholesale and retail competition will result in lower costs and opportunities for new products and services for customers. 220 ILCS 5/16-101A(b), (e). The testimony from customers affected by Edison's proposal shows that granting Edison's petition will have the opposite effects, driving many customers out of the market and back to Edison's bundled service. *See*, *e.g.*, DOE Ex. 1.0 at 23-24, L. 524-34 (Swan); MWRD Ex. 1.0 at 7-8, L. 122-29 (T. O'Connor). That testimony is opposed only by the predictions of Edison managers and consultants, who presumptuously challenge the affected customers' own declaration of their likely actions.

Moreover, several witnesses testified that Edison's flawed calculation of MVECs for Edison's PPO significantly understates the true value of retail power. As a result, retail electric suppliers (RES) have not been able to compete against the PPO without market interventions in the form of rule exceptions and discounts from Edison or from Edison's affiliate, Exelon Genco (Genco). *See*, *e.g.* NewEnergy Ex. 1.0 at 13, L. 16-17 (P. O'Connor) ("ComEd and Genco took

steps to help remedy the situation such that, in effect, ARES would be in a position to compete with the new PPO.") The need for such extra-market actions to preserve the veneer of an effectively competitive market is itself clear evidence that the current market is not sufficiently competitive to achieve the results the legislature expected.

Edison proposes to solve a different problem. Rather than address the effectiveness of the market in achieving lower prices and better service, Edison proposes to diminish the quality of service by eliminating a hedged service option for customers and artificially raising prices to give the market a more competitive appearance. In other words, ComEd urges the Commission to create "competition" by forcing customers to take worse service at higher prices, so alternative suppliers can try to more easily compete. This, of course, is a reversal of the General Assembly's intent in enacting the 1997 Amendments to the Act.

II. EVIDENCE RELATING TO SECTION 16-113

A. Identifiable Customer Segment[7]

The evidence raises serious questions about Edison's identification, pursuant to Section 16-113, of a defined group for which the competitive criteria are met today. Nearly one-third of the ≥3MW Rate 6L eligible customer group Edison selected has not moved from Rate 6L. Staff Ex. 3.0 at 16, L. 361-64 (Haas). Edison argues that the fact that they have not switched is an essentially meaningless indicator. Tr. 683 (Crumrine). Edison witnesses tried to explain this fact away by blaming customers as either unmotivated (Edison Ex. 14 at 6, L. 111 (Landon Reb.) or

[7] This topic is also discussed below in Section II. B. 3 – Reasonably Equivalent Service That Is Reasonably Available.

too timid (Edison Ex. 10 at 6, L. 112 (Juracek Reb.)). But, contradicting itself, Edison also argues that ≥ 3MW customers are very capable shoppers and are unlikely to make uneconomic decisions. Tr. 897 (Juracek). If these are characteristics of ≥ 3MW customers, then the evidence suggests strongly that a sizable subset of the defined ≥ 3MW Rate 6L customer group may lack the requisite competitive alternatives. Tr. 739 (Haas).

Edison's largest industrial and commercial customers are, almost by definition, unusual consumers, with peculiar needs. Edison describes the Rate 6L customers that would be affected by its Petition as "a diverse group with varying electricity needs." Edison Ex. 8 at 9, L. 171 (Crumrine Reb.). Yet, Edison asserts "[O]ne should not equate the inability of numerous suppliers to completely comply with the wishes of a few unique customers as a failure of the market place." Edison Ex. 8 at 16, L. 319 (Crumrine Reb.). In fact, such a range of creative alternative services is a hallmark of competitive markets – precisely the type of alternatives that Edison's Petition inconsistently says already exist. *See*, Edison Ex. 13 at 16, L. 336 *et seq*; Tr. 972-973 (Chalfant). Despite such glaring voids in the current market, much of Edison's testimony is devoted to convincing the Commission that ≥ 3MW customers are ready for competition, rather than that competition is ready for customers, providing equivalent services, comparable prices, and market protections to consumers in the defined group. *See, e.g.*, Edison Ex. 7 at 9, L. 147 *et seq.* (Crumrine Dir.); Edison Ex. 9 at 8, L. 137-42 (Juracek Dir.).

B. Reasonably Equivalent Substitute Service That Is Reasonably Available

In making its determination of competitiveness for Rate 6L, the Commission must affirmatively decide (a) what services are included in the provision of Rate 6L and (b) what

services are covered by Edison's Petition. Does Rate 6L -- as Edison sometimes suggests -- merely provide power and energy to customers? Or does it -- as Edison states at other times -- include other components, such as a price hedge? Edison's testimony on this issue is hopelessly contradictory. To meet its statutory duty to establish that "reasonably equivalent substitute service" is "reasonably available," the utility articulates a very narrow definition of rate 6L: only the provision of power and energy. Edison then claims that the market for the affected customers is already "highly competitive."[8] Edison Ex. 9 at 7, L. 134-35 (Juracek Dir.).

At other times, when arguing that an "identical" service would be an impossible standard, Edison identifies a long list of Rate 6L component services and attributes that its customers value. In so doing, Edison acknowledges that its tariffed Rate 6L consists of much more than the mere provision of power and energy. The component of Rate 6L identified by Edison that is most highly valued by customers is the price hedge that protects customers against uncertainties unrelated to the electricity commodity price. Rate 6L customers have found (and have testified) that they are unable to find alternative providers of protection against the uncertainties of CTC re-calculations, transmission and delivery service price changes, and new transmission requirements. *See*, *e.g.*, DOE Ex. 1.0 at 9, 23-24, L. 186-90, 524-35 (Swan); CACC Ex. 1.0 at 11, L. 311-16 (Fults). Edison admits that a "reasonably equivalent substitute service" for this part of Rate 6L is ***not*** reasonably available to the affected customers. Indeed, Edison argues that

[8] Edison's evidence supporting this proposition relies almost exclusively on switching statistics. Edison witnesses conceded that switching data by themselves are not proof that "reasonably equivalent substitute service" is "reasonably available." Moreover, as explained in detail below, Edison's switching data are greatly misleading and, when examined closely, demonstrate that "reasonably equivalent substitute service" for the provision of power and energy is ***not*** "reasonably available" for the affected customers.

the presence of Rate 6L prevents the development of such alternatives. Edison Ex. 3 at 4, L. 84-85 (McDermott) (the provision of fixed price tariffed services "make it difficult to provide these services on a competitive basis"); Edison Ex. 13 at 18, l. 387-88 (Landon) (Rate 6L "discourages other suppliers that would otherwise provide or utilize alternative means of hedging").

In any event, whether the Commission views Rate 6L as only the provision of power and energy or views the service at issue as encompassing all of its bundled services, the evidence shows that ComEd has failed to establish that "reasonably equivalent substitute service" is "reasonably available" for the customers that would be affected by the utility's Petition.

1. Edison Admits That There Are No Products Available to the Affected Customers That Provide a Hedge Against Volatile Prices.

Regardless of Edison's contradictory testimony on this point, the fact is – and the evidence shows – that Rate 6L is more than the provision of power and energy. Edison has not shown that there are reasonably competitive alternatives to the entirety of bundled Rate 6L service.

The overwhelming weight of the evidence shows that the current market for Rate 6L customers with demands of at least 3 MW (or for any customer, for that matter) is beset with uncertainties. Much uncertainty is created by Edison's continued collection of its CTCs. See, *e.g.*, IIEC Ex. 1.0 at 10, L. 19-20 (Brubaker Dir.); IIEC Ex. 4.0 at 12, L. 16-17 (Stephens Dir.); Fults Direct at 11, l. 313-15; BOMA/CACC Ex. 1.0 at 9, L. 223-30 (Bodmer Dir.).

Edison's CTCs are a function of the annual calculation of the market value energy charges (MVEC) that are included in Edison's PPO offering. The MVEC levels and the CTC

levels are inversely related. That is, as MVEC levels go up, CTC levels go down. Conversely, when MVEC levels go down, CTC levels go up. *See*, *e.g.*, Fults Direct at 15, l. 404-05.

Recently, MVEC levels and the resulting CTC levels have fluctuated widely and unpredictably. Chicago Area Customer Coalition (CACC) witness Bradley O. Fults testified that Edison's CTCs increased by 219% from 2001 to 2002 for the 1 to 3 MW subset of Rate 6L customers. Fults Direct at 15, l. 426-27; *see also*, Brubaker Direct at 10-11. Mr. Fults added that the 3-6 MW customers he has worked with – customers that would be affected by Edison's proposal – saw similar increases in their CTCs. *Id*. at 16, l. 433-34. Dr. O'Connor, testifying for NewEnergy[9], also stated that large customers do not choose alternative providers because of the "concern that the CTC's will be volatile due to the MVI/MVEC calculations." NewEnergy Ex. 1.0 at 11-12. Customers have found that even when commodity price hedges are available, hedges against CTC risk are not. DOE Ex. 1.0 at 9, L. 186-90 (Swan).

Besides CTC price volatility, other factors also add to market uncertainty. Included are:

- ❒ Delivery service increases – Edison's request to increase its delivery service tariffs revenue requirement by about 47% is on hold while a Commission-ordered audit is completed. CACC Ex. 1.0 at 7, L. 202-04 Fults); *see also*, NewEnergy Ex. 1.0 at 16, L. 6-8 (P. O'Connor Dir.)

- ❒ Transmission rate increases – Edison recently withdrew a petition at the Federal Energy Regulatory Commission (FERC) that would have raised its transmission rates by more than 100%. The magnitude of the proposal shows the potential volatility of transmission prices. CACC Ex. 1.0 at 8, L. 210-15 (Fults); *see also*, NewEnergy Ex. 1.0 at 16 (P. O'Connor Dir.).

- ❒ ComEd and IP have announced their intention to join a regional transmission operator (RTO) different from other Illinois utilities. The cost and market impacts

[9] AES New Energy announced during the evidentiary hearings in this case that it had changed its name to Constellation New Energy. Tr. 323-24.

> of this arrangement are unknown. CACC Ex. 1.0 at 8, L. 215-17 (Fults). Also, FERC's standard market design NOPR adds additional uncertainty.

Because alternative providers pass these risks through to customers (IIEC Ex. 4.0 at 12 (Stephens), customers are not willing to enter into contracts for more than one year. The record shows that some customers that entered into longer contracts after the June 2001 CTCs were set saw their savings disappear with the June 2002 CTCs.

Department of Energy (DOE) witness Dale E. Swan testified that the General Services Administration (GSA) accepted a multi-year offer from an Edison affiliate in 2001. DOE Ex. 1.0 at 16, 361-65 (Swan). Dr. Swan testified that the CTC increases in May 2002 raised the contract prices so much that the contract is now uneconomical when compared to the PPO or Rate 6L – even after ComEd's affiliate agreed to reduce the contract price by ½ cent. *Id*. At 16-17, l. 366-68.

Illinois Industrial Energy Consumer (IIEC) witness Gordon Hauk testified that Ford Motor Company entered into a fixed-price multi-year agreement in January 2001. IIEC Ex. 6.0 at 3 (Hauk). Prices under the Ford contract increased by 20% when the 2002 CTC charges took effect. *Id*. IIEC witness Mark F. Kelly discussed Caterpillar Inc.'s experience in trying to purchase competitive power in the ComEd service territory. Caterpillar's consultant informed the company that the 6% discounts offered by RESs were more than offset by the 2002 CTCs. IIEC Ex. 5.0 at 4 (Kelly). Caterpillar's consultant concluded its analysis of the RFP responses by stating: "'Although a fixed commodity price of $0.033/kWh is competitive and would be recommended in other deregulated territories, the recent CTC risk and uncertainty on the delivery

service side has led Summit to recommend waiting until regulatory decisions surrounding these risks are finalized.'" *Id*. at 5.

These examples demonstrate both impact of Edison's CTCs and the value of the Rate 6L "safe harbor." CACC Ex. 1.0 at 9-10, L. 271-72 (Fults).

There is no doubt that Rate 6L is more than the simple provision of power and energy. In the current environment, the hedge component of Rate 6L is a valuable tool for customers to protect themselves in a volatile market. Equivalent tools are not currently available from RESs.

2. Edison Failed to Show That Reasonably Equivalent Substitute Service for the Provision of Energy and Power Is Reasonably Available from Non-Affiliated Provider(s).

Edison's Petition and evidence fail even if one accepts the utility's argument that Rate 6L consists merely of the provision of power and energy. Edison's testimony that "reasonably equivalent substitute service" is "reasonably available" for the provision of power and energy to ≥ 3 MW 6L customers consists almost solely of "switching statistics." Edison witnesses Crumrine and Kelter state that (a) "more than 70% of the customers in the 3 MW or greater group that are eligible to take bundled service under Rate 6L (as defined in the Petition) have opted for an unbundled alternative" and (b) of that 70+%, "nearly 44% are currently taking service from a RES not affiliated with ComEd." Edison Ex. 7 at 4-5, L. 63-66, 70-71 (Crumrine Direct). From these data, they conclude that the percentage of customers that have chosen to take RES-supplied electric power and energy confirms that "the combination of unbundled delivery services and RES-supplied power and energy is reasonably equivalent to bundled service under Rate 6L." *Id*. at 5, L. 77-82.

However, Attachment PRC/DFK-1 to the Crumrine testimony shows that 29% of affected customers remain on bundled service, 31% take service from unaffiliated RES's, and 40% take power from Edison's PPO, Edison's Rate ISS (interim supply service), or Edison-affiliated RES (collectively, PPO/Other). Edison Ex. 7 at 11, L. 203-07, Attachment PRC/DFK-1 (Crumrine Dir.).

Even minimal scrutiny reveals that ComEd's switching statistics do not support Edison's proposition. To begin with, 29% of affected customers – a sizable number – remain on Rate 6L. As Staff witness Dr. Haas explained, there is evidence that these customers do not "have access to reasonably equivalent substitute service." Staff Ex. 3.0 at 14, L. 330-32 (Haas).

Second, the 40% of customers included in the PPO/Other category cannot be counted as customers taking competitive supply for purposes of Section 16-113(a), since Section 16-113(a) requires that services are provided by non-affiliated providers. 220 ILCS 5/16-113(a). The PPO "is directly provided by ComEd, just like Rate 6L." Staff Ex. 3.0 at 7-8, L. 170-72. Similarly, Rate ISS is a ComEd-supplied tariff service. Customers taking service from an Edison-affiliated RES are also excluded from Section 16-113(a) consideration.

Removing these categories reduces Edison's 70+% figure to a more mundane 31%. When examined, even that 31% is not truly indicative of competitive alternatives for the affected customers.

Edison's 2002 MVECs "were considerably below market those values actually prevailing in the market place." NewEnergy Ex. 1.0 at 13 (P. O'Connor Dir.). As a result, the "PPO became the 'only game in town.'" (*Id*. at 13) and "the competitive market for all classes of customers in ComEd was thrown into turmoil." *Id*. at 12-13. ComEd and its affiliate Exelon

Genco took decisive action. Exelon Genco offered "special . . . arrangements" to RESs not affiliated with Edison so that the non-affiliated RESs "would be in a position to compete with the new PPO." NewEnergy Ex. 1.0 13 (P. O'Connor Dir.) For its part, ComEd obtained Commission permission to modify its PPO so that customers could exit PPO contracts and enter into contracts with RESs. *Id*. at 13, L. 17-20. In short, Edison and its affiliate worked together to provide extra-market support to non-affiliated RESs. The arrangement

> . . . allowed the RESs in ComEd's territory to maintain a visible presence in the marketplace, rather than explicitly lose customers to the ComEd-provided PPO or traditional bundled service. In other words, it has preserved an appearance of continuously available *"competitive"* supply options.

Staff Ex. 3.0 at 10, L. 233-36 (emphasis in original) (Haas). Dr. Haas added that

> [h]ad Exelon not intervened to prop up the retailers, the retail market most likely would have shifted back toward monopoly service, with customers switching to the PPO or returning to bundled services like Rate 6L.

Id. At 10, L. 236-39.

The validity of the 31% figure for ≥ 3MW 6L customers taking service from non-affiliated RESs (and Edison's other switching data) is hopelessly compromised, calling into question the evidentiary legitimacy of the utility's switching statistics. Without the ComEd/Exelon Genco intervention, it is likely that a substantial number of those customers would have migrated back to ComEd's PPO or to Rate 6L. Staff Ex. 3.0 at 11, L. 252-55 (Haas); Tr. 637 (Crumrine). The need for such intervention cannot be considered a characteristic of a competitive market. In fact, it "is strong evidence that the market, as it now stands, may be incapable of sustaining competition." Staff Ex. 3.0 at 11, L. 255-56 (Haas); *see also*, IIEC Ex. 1.0 at 6 (Brubaker).

In sum, viewing Rate 6L as the mere provision of power and electricity – as Edison sometimes does – does not help the utility's case. The 70+% switching figure that ComEd cites as evidence of a "highly competitive" market shrivels under even modest exposure. Customers representing 40 of the 70 plus percentage points are receiving power service directly from ComEd or a ComEd affiliate and, therefore, are not relevant to the Section 16-113(a) analysis. The remaining 31% are receiving power from RESs receiving discounts from an Edison affiliate and special treatment from Edison.

3. *The Record Shows That a Substantial Number of Customers Remain on Rate 6L and Do Not Have Access to "Reasonably Equivalent Substitute Services."*

Edison admits that approximately 29% of affected customers have remained on Rate 6L. Dr. Haas testified that (a) that number has remained stable and (b) the individual customers taking service under Rate 6L have not been switching back and forth between bundled service and delivery services. Staff Ex. 3.0 at 16-17, L. 371-72, 371-83 (Haas). This is evidence that these customers do not have access to "reasonably equivalent substitute service." Dr. Haas explained that it is possible that these customers have load profiles that are difficult for RESs to serve. Customers with unpredictable, varying loads may subject RESs – or their customers – to imbalance penalties under ComEd's OATT if actual loads deviate from day-ahead demand projections. Staff Ex. 3.0 at 18, L. 398-07 (Haas). Such risks may be unacceptable to RESs or prohibitively expensive for customers. As a result, such customers have to rely on Rate 6L or ComEd's PPO – options that do not include imbalance penalties. *Id*. at 18, L. 408-10.

Besides customers with varying loads, there is substantial evidence in the record that other customers, despite significant efforts to do so, could not procure competitive power from

alternative providers. City Department of Environment Deputy Commissioner Steven Walter testified concerning a request for qualifications (RFQ) issued by the City and others to meet the power and energy needs of the City, four sister agencies, and approximately 50 suburbs (collectively, RFQ Participants). City Ex. 1.0 at 2, L. 28-31. Several of the facilities to be served under the RFQ have demands greater than 3 MW, and that the RFQ Participants are sophisticated users of electricity. *Id*. at 4, 5-6, L. 75-76, 98-107. According to Edison, these characteristics are the hallmark of economically desirable customers for suppliers. Edison Ex. 7 at 8-10 (Crumrine). Despite the additional allure of high profile facilities, like O'Hare and Midway Airports, that seemingly would be attractive to entrants looking to establish a presence in Illinois, the City received only three response to the RFQ, and only one of those merited serious consideration. City Ex. 1.0 at 2, 6-7, L. 16-18, L. 121-34 (Walter). That bid required an eight-year contract term that exposed the RFQ Participants to significant price risk in the later years of the contract. *Id*. at 8, L. 145-59.[10]

Dr. Swan, on behalf of the Department of Energy, testified that U.S. government has also been unsuccessful in procuring competitive power in ComEd's service area. Dr. Swan described six separate request for proposals issued by the U.S. government – four by the Defense Energy Supply Center (DESC) and two by the GSA. DOE Ex. 1.0 at 13-14, L. 292-96 (Swan). Dr. Swan testified that "[n]either DESC nor GSA has been able to make an award to any bidder as a

[10] After long negotiations, the City entered into a contract with an Enron subsidiary, but never took service due to Enron's well-publicized financial collapse in November 2001. City Ex. 1.0 at at 9, L. 174-82. Other RFQ Participants were unable to procure "reasonably equivalent substitute service." *Id*. at 10, L. 174-82, 186-95.

result of these six competitive solicitations."[11] *Id*. at 14, L. 298-99. Dr. Swan added that the federal government has been able to award power and energy contracts in several other open access states. *Id*. at 14, L. 311-14.

The distinctive characteristics of many ≥ 3MW customers, the stability of the group not switching, and actual customer experiences constitute powerful evidence that a significant portion of affected customers do not have access to a "reasonably equivalent substitute service" for Rate 6L.

C. Comparable Price

Assuming *arguendo* that there are "reasonably equivalent substitute services" "reasonably available" to affected customers, ComEd utterly failed to demonstrate that such services are available at a "comparable price." Contracts with alternative providers are more risky than Rate 6L because of annual MVEC and CTC calculations

Incorporating a hedge in the price of power and energy would necessarily increase the price of that product. BOMA/CACC 1.0 at 24, L. 651-52 (Bodmer); *see also*, IIEC Ex. 4.0 at 12, L. 20-23 (Stephens). Rate 6L and PPO rates, in contrast are not affected by MVEC and CTC fluctuations.

ComEd offered little in the way of evidence that a bundled Rate 6L service or the hedging component of Rate 6L alone is available at a comparable price. Edison witness Karl McDermott

[11] As discussed earlier, Dr. Swan testified that the GSA received an unsolicited bid from an Edison affiliate in 2001 after the GSA received no bids in response to an RFP issued in March 2001. The GSA and the Edison affiliate entered into a 44-month contract that is now uneconomical – when compared to the PPO and Rate 6L – because of the dramatic increases in the MVECs for 2002 Period A. Swan Direct at 16-17, L. 361-68.

provided vague testimony about a hedging product he found on the Internet. Tr. 214-15. When pressed, Dr. McDermott admitted that: (1) the company offering the product was a broker, not a RES (Tr. 215); (2) he did not know if the company was offering the product in the ComEd service territory (*Id.*); and, most importantly, (3) he did not know the price at which the company was offering its hedging product (Tr. 216). In short, there is no evidence as to whether the product is reasonably available in ComEd's service territory or, if it is, whether it is available at a comparable price.

Edison witness Dr. John H. Landon also claimed that there are Illinois RESs offering fixed-price savings contracts. Edison Ex. 13 at 16, L. 336-39, 20, L. 416-17 (Landon Dir.). When asked about this testimony on cross-examination, Dr. Landon conceded that he was not familiar with the terms and conditions of the offer and that he had "no specific knowledge of the prices." Tr. 1039-40 (Landon).

In sum, Edison completely failed to establish that any "reasonably equivalent substitute service" for Rate 6L is "reasonably available" at a "comparable price."

D. Other Providers

Edison's position in this case is that Rate 6L is impeding the development of hedging products that would protect customers against price volatility. *See*, *e.g.*, Edison Ex. 9 at 11, L. 207-09 (Juracek Dir.); Edison Ex. 13 at 18, L. 387-88 (Landon Dir.). The solution, according to ComEd is to toss customers with demands greater than 3 MW off of Rate 6L and trust that alternative providers will develop the necessary hedging products. Before buying into this

scheme, the Commission must consider the immediate effect on customers left without economic alternatives and the health of the potential alternative providers that may develop new services .

IIEC witness Robert R. Stephens noted that of the 14 potential RESs Edison identified as potentially serving ≥3 MW Rate 6L customers, only five are actually serving them. IIEC Ex. 4.0 at 13 (Stephens). Those five are: (1) MidAmerican Company (MidAmerican); (2) AES NewEnergy, Inc. (NewEnergy); (3) Dynegy Energy Services, Inc. (Dynegy); (4) Peoples Energy Services Corporation (Peoples); and (5) AES Central Illinois Light Company (CILCO). Mr. Stephens testified further that each of the five RESs serving these customers face considerable uncertainty in their ability to continue to provide service in the ComEd service area. *Id*. at 14.

The primary source of uncertainty Mr. Stephens identified is a recent decision from the Fifth District of the Illinois Appellate Court. *Id*. at 14. The court in *IBEW v. Illinois Commerce Commission*, No. 5-01-0416, interpreted Section 16-115(d)(5) of the Act (220 ILCS 5/16-115(d)(5) (the reciprocity provision) to require that affected Illinois utilities be able to physically and ***economically*** deliver power to the service territories of potential Alternative Retail Electric Suppliers (ARES) that (1) own, or whose affiliates own, transmission and distribution facilities within a defined territory specific and that (2) are seeking to provide service in a Illinois utility's service area. The court also found that potential ARES must own transmission and distribution facilities. In addition, potential ARES, or their affiliates, must offer delivery services comparable to those offered by the affected Illinois utility. The Commission has filed a petition for leave to appeal the court's decision. However, if the decision is not overturned, the impact on potential ARES could be significant.

In addition to the *IBEW* decision, Mr. Stephens identified (1) an uncertain regional transmission operator (RTO) environment caused by generation resources being located in different RTOs than their customers, FERC's Standard Market Design (SMD) Notice of Public Rulemaking, and (3) RESs' financial difficulties other areas of uncertainty. IIEC Ex. 4.0 at 14, L. 8-13.

Mr. Stephens analyzed the particular uncertainties important for each of the five RESs supplying services to ≥ 3 MW rate 6L customers.

- ❒ MidAmerican – Mr. Stephens stated that because MidAmerican is a member of a different RTO from ComEd, uncertainties follow retail transactions in Edison's service territory if MidAmerican relies on generation resources outside of ComEd's RTO. IIEC Ex. 4.0 at 17, L. 13-21 (Stephens).

- ❒ NewEnergy – NewEnergy is now part of the Constellation Energy Group. The Constellation Energy Group is the parent company of Baltimore Gas & Electric (BG&E), a utility owning transmission and distribution facilities in Baltimore. NewEnergy's continued existence as a RES in Illinois is threatened by the *IBEW* case if NewEnergy cannot demonstrate that Edison can physically and ***economically*** deliver power and energy to BG&E's service territory. IIEC Ex. 4.0 at 18, L. 1-20 (Stephens).

- ❒ Dynegy – Dynegy faces tremendous financial uncertainty. In being certified as an ARES, Dynegy relied on a guaranty provided by Dynegy Holdings, Inc, which, at the time, had a Standard and Poor's credit rating of BBB+. Dynegy Holding, Inc.'s credit rating was rated at below investment grade at B+ by Standard and Poor's on August 19, 2002. It is uncertain if Dynegy will be able to meet the financial requirements for ARES certification. IIEC Ex. 4.0 at 18-19 (Stephens).

- ❒ Peoples – Mr. Stephens testified that because Peoples does not own transmission and distribution facilities, its ability to remain certified as an ARES is uncertain in light of the *IBEW* decision. IIEC Ex. 4.0 at 19, L. 16-23 (Stephens).

- ❒ CILCO – AES recently announced that it was selling CILCO to Ameren Corporation (Ameren). Mr. Stephens stated that Ameren has testified before the Commission that CILCO's retail marketing arm will be transferred to Ameren Energy Marketing (AEM). Unless AEM takes over CILCO's marketing activities in ComEd's territory, there will be one less ARES serving affected Rate 6L

> customers. Mr. Stephens added that because Ameren owns a utility owning transmission and distribution facilities in a non-open access state, it is doubtful that Ameren would satisfy the reciprocity provision of the Act as interpreted by the *IBEW* court. IIEC Ex. 4.0 at 20, L. 7-21 (Stephens).

In short, there are significant uncertainties facing each of the alternative suppliers currently providing service to ≥ 3MW Rate 6L customers. The Commission should be wary of approving the utility's Petition in the hope that these companies, at some future date, will develop hedging products that replace the hedging component of Rate 6L.

E. Loss of Business

Section 16-113 requires that in the context of a competitive declaration proceeding, the utility must demonstrate that "the electric utility has lost or there is a reasonable likelihood that the electric utility will lose business for the service to . . . other providers." 220 ILCS 5/16-113. The purpose and history of the Commission's competitive declarations is important as the Commission interprets and applies Section 16-113 to an electric utility for the first time.

As Mr. Bodmer explains, such declarations protect a utility against a loss of revenues due to loss of business to alternative providers. BOMA/CACC Ex. 1.0 at 28, L. 746 (Bodmer). A utility's regulated rates are set at a level that give it an opportunity to earn revenues that provide a just and reasonable return. Where an inability to "react to market forces" results in (or is likely to result in) a loss of business, a competitive declaration is authorized as a remedial measure. The utility's opportunity to earn its authorized revenues is effectively restored by the declaration.

Here, however, Edison has exercised its option to impose a CTC. 220 ILCS 5/16-108. The CTC is calculated using a "lost revenue formula" that "protects rate 6L revenues, and

eliminates downside risk to Edison. BOMA/CACC Ex. 1.0 at 29, L. 767-71 (Bodmer). Since Edison has not proposed to eliminate or to modify its CTC, there is no real loss of business for Edison. Customers may leave Edison's bundled Rate 6L service to contract with a RES, and thus, generate "switching statistics." But, except for a legislatively mandated shopping credit, the mitigation factor, Edison collects its revenues from those "lost" customers nonetheless, through the CTC.

Simple mathematics precludes any possibility of Edison showing that it has or is likely (in any meaningful way) to "lose business for the service to . . . other providers." Mitigation factor losses are legislatively imposed incentives for customers and flow to the customer – or to Edison if the customer's CTC is zero; the business is not lost to competitors.[12]

F. Transmission Capacity

G. Customer Switching

As noted at the beginning of the Argument Section of this brief, Edison's entire case rests fundamentally on the validity of its statistical data as proof of competition. No party to this proceeding – Edison included – accepts "switching" as the equivalent of competition.

Edison's regulatory expert, Dr. McDermott, testified that the Commission must "be evaluated carefully because some states provided 'shopping credits' to induce customers to switch, and therefore the switching rates observed may simply be an artifact of regulatory policy

[12] Moreover, as noted earlier, Edison's Petition essentially perverts Section 16-113 further by using a declaration that the service is competitive to evade the abandonment requirements of Section 8-508.

(*i.e.*, inefficient competitors may in some cases be gaining market share from more efficient providers). ComEd Ex. 1.0 at 9, L. 196-99 (McDermott Direct). Dr. McDermott's warning is well-taken in this case because Edison's switching data – practically the only evidence the utility offered to support its claim that "reasonably equivalent substitute service" is reasonably available" at "comparable price" – is extremely suspect.

Edison claims that more than 70% of ≥ 3 MW customers have "opted for an unbundled alternative." Crumrine Direct at 4-5, L. 63-66. Of that 70+%, Messrs. Crumrine and Kelter assert that "nearly 44% are currently taking service from a RES not affiliated with ComEd." *Id.* at 5, L. 70-71. As explained in detail above, ComEd's switching data are faulty and do not support ComEd's assertion that the market for ≥ 3 MW customers is "highly competitive."

Staff witness Dr. Haas – among others – dismantled Edison's 70+% switching figure. First, Dr. Haas noted that 40% of the customers in the 70+% number cited by Edison are served directly by ComEd through the utility's PPO or Rate ISS or an Edison-affiliated RES. Staff Ex. 3.0 at 7, L. 158-61. Obviously, these customers are not served by a non-affiliated provider as required by Section 16-113(a). 220 ILCS 5/16-113(a). The remaining 31% of affected customers receiving power from unaffiliated RESs that are benefitting from Exelon Genco's market intervention. Staff Ex. 3.0 at 7, L. 163-65 (Haas).

The evidence shows that Dr. McDermott's warning is particularly apt in this case. The switching statistics so heavily relied on by Edison do not demonstrate that the affected customers have "reasonably equivalent substitute services" available to them. Indeed, a cursory analysis of the reasons that customers switched reveals a market that has required massive subsidies from a ComEd affiliate to maintain even the appearance of competitiveness.

H. Wholesale Market Development

Edison acknowledges that the wholesale market and the retail market for electricity are distinct entities. Tr. 422, 436 (McNeil). Though the wholesale market facilitates the operation of retail markets, competition in the wholesale market does not equate to competition in the retail market. Yet, this distinction is not consistently recognized in Edison's evidentiary presentation. As CACC witness Mr. Fults states, "Edison's testimony seems to focus on wholesale competition which, even of it were competitive, does not necessarily translate into robust retail competition." CACC Ex. 1 at 8,L. 235 (Fults).

A robustly competitive wholesale market is frequently described as a necessary prerequisite for an effectively competitive retail market. *See, generally*, Edison Ex. 5 (McNeil). To that extent, the evidence Edison presents respecting the wholesale market may be relevant in assessing the state of the retail market under Section 16-113 criteria. However, as Mr. Fults pointed out, it is not proof of the retail level competition that Section 16-113 requires. CACC Ex. 1 at 8, L. 235 (Fults).

In any case, some have questioned whether a workably competitive market exists even at the wholesale level. IIEC Ex. 3.0 at 6, 7 (Dauphanais). A number of experts who have examined the wholesale market serving RESs operating in Edison's service territory have concluded that the data of market activity is distorted. DOE Ex. 1.0 at 23, L. 509 (Swan); IIEC Ex. 3.0 at 2-3 (Dauphanais). Moreover, wholesale market competition, at whatever level it exists today, may itself be at risk from the possible application of new RTO transmission requirements or from pending new FERC requirements. IIEC Ex. 3.0 at pp 13, 14 (Dauphanais); Tr. 448-449

(McNeil). In the end, Edison's reliance on evidence respecting the state of the wholesale market may harm, rather than help, its attempt to satisfy the retail competition criteria of Section 16-113.

I. Retail Market Development

See, subsection H. Wholesale Market Development, *supra*.

J. Customer/Supplier Reaction

K. Other

Rate 6L Is Not A "Free Option" As Edison Alleges

Rate 6L is not a "free" call option. The costs of serving Rate 6L customers, including the risk costs are included in its charges. Although Edison disingenuously observes that Rate 6L "was not . . . priced as a hedge," (Edison Ex. 10 at 5, L. 71 (Juracek Reb.); but the CTC charges of its DST tariff do cover that risk. As BOMA/CACC witness Mr. Bodmer explained, "the CTC is designed as a lost revenue formula to make Edison indifferent to generation volume lost to competitors." BOMA/CACC Ex. 1.0 at 29, L. 767 (Bodmer). The CTC preserves Edison's pre-competition level of Rate 6L of revenues – even when customers are taking service from a RES. *Id*. At L. 782. In other words, customers continue to pay for that Rate 6L option, even when they are not using it. Customers who follow Edison's advice to seek hedging products in the market could end up paying twice – once to a market supplier, and again to Edison through the CTC – for protection it receives only if rate 6L is withdrawn.

Mr. Bodmer explained further (BOMA/CACC Ex. 1.0 at 24, L. 684 *et seq.* and Att. A), that any free option here actually belongs to Edison. The utility exercises this option each time it elects to recalculate and to continue the CTC. The CTC provides a hedge (except for the mitigation factor), at customers' expense, against the possible loss of regulated era revenues due to market price changes and any resulting customer movement from Rate 6L.

III. PROPOSED AMENDMENTS TO 6L

A. New Customers

B. Extension of Transition Period for Customers on Rate

C. Extension of Return Option for Customers Not on Rate

D. Eligibility Criteria

IV. ACCOUNTING ISSUES

A. Accounting Treatment of Revenues and Expenses

1. During 3-Year Mandatory Period for Tariffed Service

2. After 3-Year Mandatory Period

B. Ratemaking Treatment of Revenues and Cost under Rate 6L Pursuant to Section 16-111(d)

V. OTHER

A. Reconsideration of Joint Movants' Motion to Dismiss

Joint Movants – the City, CUB, the Cook County State's Attorney's Office, the Building Owners and Managers Association, IIEC, the Chicago Area Customer Coalition, and the Illinois Attorney General's Office – filed a Motion to Dismiss or, in the Alternative, for Summary Judgment, (Joint Motion to Dismiss)on August 22, 2002. The ALJs denied the Motion on September 9, 2002. The ALJs erred in denying the Motion, because Edison's Petition failed to include the "specific relief sought" as required under Illinois law. 83 Ill. Adm. Code 200.100(c); see also 735 ILCS 5/2-603(a).

Edison's Petition should be dismissed for a number of reasons, but most importantly because the Petition's indefinite and ambiguous request for relief fails to satisfy the requirements of law for a clear statement of the relief being sought. There are two mutually exclusive ways in which Edison's Petition could be interpreted. First, Edison's Petition could be read to request that the Commission declare all of Rate 6L "competitive," thereby relieving Edison of its obligation to provide under tariff all services bundled as Rate 6L to customers with a demand of at least 3 MW (the "total tariff" approach). The affected component services include, *inter alia*, metering, price hedging, and commodity supply services. Second, the Petition could be read to request only that the Commission declare competitive a subset of Rate 6L components – the provision of electric power and energy (the "single component" approach). On the face of Edison's filing, one cannot discern which form of relief Edison seeks.

Edison and Illinois Power Company (IP) each filed a response to the Joint Motion. Each of them asserted that there could be "no question" regarding which approach Edison seeks. *See*,

Edison Response at 3-4; IP Response at 2. The parties, however, come to opposite conclusions: Edison claimed the Petition sought the "total tariff" approach; IP claimed that the Petition took the "single component" approach. *Id*. Edison's and IP's contradictory conclusions amount to *prima facie* evidence that Edison's Petition is fatally ambiguous.

Without establishing by their ruling which approach Edison's Petition is deemed to request or stating any other basis for their dismissal, the ALJs issued a written decision summarily denying the Joint Motion. Thus, despite the denial of their Joint Motion, it still is unclear which approach the Joint Movants – or the Commission – must use in analyzing Edison's Petition. Without the benefit of a Commission decision on the issue of the requested relief, Joint Movants have essentially been forced to litigate two cases. The Commission must, however, make a determination regarding the specific relief sought before it can address the merits of the Petition.

Taking either version of Edison's representations at face value, the allegations and evidence contained in Edison's filed case in chief are deficient as a matter of law, and therefore summary judgment should be granted. Assuming *arguendo*, that Edison seeks to have all of the components of Rate 6L declared competitive, Edison failed to present evidence sufficient to support a finding by the Commission that the "whole tariff" should be declared "competitive" under the criteria of Section 16-113 of the Act. To satisfy those requirements, Edison must demonstrate, among other things, that a reasonably equivalent substitute service is being provided by a company that is not affiliated with Edison, at a price that is comparable to the price at which Edison offers the service(s). See 220 ILCS 5/16-113. Edison failed to allege or to present evidence that demonstrates that all of the services it bundles under Rate 6L are available

from other providers. Edison also did not prove that those services are available at comparable prices. See 220 ILCS 5/16-113. Edison's testimony addresses only one of the service components contained in Rate 6L. Edison's case-in-chief presents no evidence that other companies are providing substitute bundled services (including the price protection component), that the prices for such bundled services are comparable to the prices Edison charges under Rate 6L, or that Edison has lost any business as a result of providing Rate 6L as a regulated service.

If, on the other hand, ComEd intended only to seek to have the portion of Rate 6L under which it provides power and energy declared competitive, ComEd's Petition likewise is deficient. Edison's case-in-chief fails to define how the remaining non-competitive tariffed services would be provided. The Act requires that ComEd continue to provide tariffed services, unless either the service is "declared competitive" pursuant to Section 16-113, or the service is "abandoned," pursuant to Section 8-508. See 220 ILCS 5/103(a); 220 ILCS 5/16-113; and 220 ILCS 5/8-508. ComEd has provided, in its Petition and case-in-chief, no information, allegations, or evidence respecting the manner in which it will provide those services not declared competitive or abandoned. Therefore, the Commission should reconsider the ALJs ruling denying the Joint Motion and should dismiss, or in the alternative, grant summary judgment in this proceeding.

CONCLUSION

Wherefore, the City, Citizens Utility Board, and the People of Cook County, *ex rel.* Richard A. Devine, respectfully urge the Commission to deny Edison's Petition or, in the alternative, reconsider and grant the Joint Movants' Motion to Dismiss or, In the Alternative, for Summary Judgment.

Date: September 24, 2002

Respectfully submitted,

City of Chicago
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Corporation Counsel

By:_____
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People of Cook County
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Leijuana Doss
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Citizens Utility Board

By:_____
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Via E-Docket

September 24, 2002

Donna M. Caton
Chief Clerk
Illinois Commerce Commission
527 East Capitol Avenue
P.O. Box No. 19280
Springfield, Illinois 62794-9280

Re: I.C.C. Docket No. 02-0479

Dear Ms. Caton:

Please be advised that I am filing today with the Commission, via E-Docket, Government and Consumer Parties' Initial Brief in the above-referenced docket.

Thank you for your assistance in this matter.

Sincerely yours,

Ronald D. Jolly
Assistant Corporation Counsel
(312) 744-6929
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encl.

cs: Service List

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Commonwealth Edison Company	:	
	:	
Petition for declaration of service currently	:	
currently provided under Rate 6L to 3 MW and	:	Docket 02-0479
greater customers as competitive service	:	
pursuant to Section 16-113 of the Public	:	
Utilities Act and approval of related	:	
tariff amendments.	:	

NOTICE OF FILING

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE THAT ON THIS DATE I caused to be e-mailed to Donna M. Caton, Chief Clerk, Illinois Commerce Commission, 527 East Capitol Avenue, P.O. Box 19280, Springfield, Illinois 62794-9280, Government and Consumer Parties' Initial Brief for filing in the above-captioned docket.

CERTIFICATE OF SERVICE

I, Ronald D. Jolly, an attorney, hereby certify that a copy of the foregoing Government and Consumer Parties' Initial Brief was served upon the party or parties listed below, by hand-delivery, by express mail, by e-mail, or by first class mail, postage prepaid, from Suite 900, 30 North LaSalle Street, Chicago, Illinois 60602, in accordance with the Rules of Practice of the Illinois Commerce Commission.

DATED: September 24, 2002

_____

Ronald D. Jolly
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